



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO:** THE COMMISSION  
STAFF DIRECTOR  
GENERAL COUNSEL  
CHIEF COMMUNICATIONS OFFICER  
FEC PRESS OFFICE  
FEC PUBLIC DISCLOSURE

**FROM:** COMMISSION SECRETARY *MW*

**DATE:** July 27, 2009

**SUBJECT:** COMMENT ON DRAFT AO 2009-17  
Romney for President, Inc.

Transmitted herewith is a timely submitted comment from Benjamin L. Ginsberg, Esq., and Glenn Willard, Esq., regarding the above-captioned matter.

Proposed Advisory Opinion 2009-17 is on the agenda for Tuesday, July 28, 2009.

**Attachment**

**PATTON BOGGS LLP**  
ATTORNEYS AT LAW

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

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July 27, 2009

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**VIA FACSIMILE**

Rosemary C. Smith, Esquire  
Associate General Counsel  
Office of the General Counsel

Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463

Re: Advisory Opinion Request 2009-17

Dear Ms. Smith and Ms. Dove:

On behalf of Romney for President ("RFP"), the requester of AO 2009-17, we submit the following comments on Drafts A and B. RFP appreciates the diligent work by the Office of General Counsel in preparing these drafts. After reviewing both, we believe that Draft B is consistent with the statutes, regulations and precedent of the Commission, while Draft A is not. We urge the Commission to adopt Draft B for the reasons explained below.

RFP submitted this request because, wanting to wind-down and terminate, it faced the issue of how to dispose of a significant sum resulting from stale, unnegotiated refund checks. In considering how to dispose of these funds, we found no actual authority to guide committees not accepting U.S. Treasury funds for their campaigns. Neither we, nor apparently Draft A, can find any authority requiring that these funds be disgorged to the U.S. Treasury.

As such, RFP wishes to send the funds to a recognized 501(c)(3) charity that directly, specifically and visibly improves the lives of others in our communities. The charity, The Cystic Fibrosis Foundation, does not engage in electioneering activities or issue advocacy campaigns.

Draft A posits that 2 USC 439a and 11 CFR 113.2(b), which permit transfers to charitable organizations, are not applicable because those provisions "are premised" on the funds transferred being permissible under the statute. Significantly, however, Draft A cites no authority

Commission Secretary

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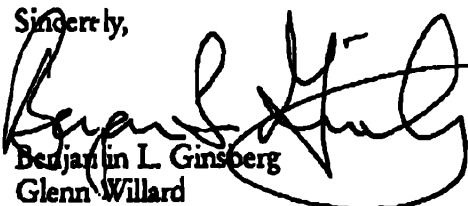
for its "premise". Absent this unsubstantiated premise, Draft A collapses.<sup>1</sup> Further weakening Draft A is its concession that "the Act and Commission regulations do not specifically address what options are available to authorized committees that do not accept public financing with leftover funds resulting from stale-dated committee refund checks." *Id.* at 4.

Thus, Draft A inadvertently makes the case for why RFP may send an amount equal to its stale, unnegotiated refund checks to a section 170 (c) organization. Draft A refers only by attenuated analogy to regulations which apply solely to campaigns which take U.S. Treasury funds while ignoring the unique position a campaign places itself in once it accepts U.S. Treasury funds. Compare to Draft B at 5. Without further support, Draft A finds those regulations should control here rather than AOs 1991-39 (D'Amato) and 1995-19 (Indian-American Leadership Investment Fund), which concerned committees that did not accept U.S. Treasury funds and were permitted to transfer funds they could not retain to charitable organizations.

Furthermore, Draft A fails to overcome the absence in the statute or regulations of any direction, such as exists for campaigns taking U.S. Treasury funds, to campaigns such as RFP which do not accept U.S. Treasury funds. As Draft B at 4 correctly states: "Where the Act and Commission regulations are silent as to a particular proposed activity, such actions are presumed to be permissible. Nothing in the Act or Commission regulations specifically mandates disgorgement [to the U.S. Treasury] in this situation. Nor does anything in the Act or Commission regulations specifically foreclose the donation of unclaimed refunded contributions to a qualified charitable organization." The absence of any bar in any regulation pertaining to RFP means that a donation such as the one requested here must be permissible.<sup>2</sup>

For the foregoing reasons, RFP urges the adoption of Draft B.

Sincerely,



Benjamin L. Ginsberg  
Glenn Willard

<sup>1</sup> Indeed Draft A at 3-4 does note instances where illegal contributions can be donated to 26 USC 170(c) organizations. Since the persons to whom RFP sent the refund checks are not cashing them, it seems irrelevant whether they can be identified or not.

<sup>2</sup> Advisory Opinion 2003-18 (Smith) does not apply to RFP for two reasons. First, the funds at issue there pertained to general election funds collected by a candidate who did not become a candidate in that election. RFP agrees that in such a situation all general election funds must be returned. Second, the charitable organization to which the campaign sought to transfer its funds was established by the candidate himself, which is not the situation here.